A

WONG WEE KHEONG & ANOR

v.

DAYA BERSAMA SDN BHD & OTHER APPEALS

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEALS NO: 02(f)-64-10-2011(W),
02(f)-65-10-2011(W), 02(f)-66-10-2011(W)
& 02(f)-67-10-2011(W)]
13 MARCH 2013

D

COMPANY LAW: *Winding up - Disposition of property - Sale and purchase agreement - Failure to obtain consent of liquidator or order of court - Whether transaction valid - Purchasers acquired property in good faith for value without notice - Proof of - Allegation of fraud - Whether*
E *actual fraud proven - Whether records showed company wound up at time transaction took place - Whether purchasers' title indefeasible - Whether company relinquished its registered interest when sale of property concluded - Whether court has discretion to validate transfer - Companies Act 1965, s. 233 - National Land Code, s. 340(1)*

F

The respondent company was wound-up by an order of court. Having settled the full purchase price, the appellants transacted and bought their respective piece of land from the respondent to build their residential home thereon. Throughout the said transaction and registration of ownership of the said lands,
G necessary searches were conducted revealing, *inter alia*, that (i) the said lands were free from encumbrances; (ii) there was no record of a winding-up order being lodged against the respondent; and (iii) the appellants were dealing with the proper company directors at the relevant time. The appellants were then duly registered as
H the legal and beneficial owners of the said lands. In the High Court, the respondent filed several applications against, *inter alia*, the Companies Commission of Malaysia ('CCM') and the purported bogus directors and shareholders of the company seeking that the respondent's records be rectified since fraud had
I taken place in the transaction involving the sale of the lands. It was also the respondent's claim that (i) the sale of the said lands be nullified; and (ii) all transactions made after the winding-up of

the respondent be declared void. Dismissing the respondent's application, the High Court held that being *bona fide* purchasers of the said lands for value without notice of any defect to title or the winding-up of the respondent, the appellants had acquired indefeasible title over the lands. Dissatisfied, the respondents appealed to the Court of Appeal and their appeal was allowed whereby it was held that once a company was wound-up, only a liquidator could dispose of the company's property and any instrument of transfer signed by any other person was void. Hence, this appeal by the appellants. The issue that arose for determination *vide* this appeal was whether a company in liquidation which had disposed of its land to a third party without the consent of the liquidator or order of court could be construed to still have a registered interest in that land which could defeat the registered interest of the third party who acquired the property in good faith for value and without notice.

Held (allowing appeals with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The proviso in s. 223 of the Companies Act 1965 ('the Act') is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid. The general rule in s. 223 of the Act is that it does not shut out *bona fide* transactions. On the facts, the advertisements and gazette in respect of the winding-up proceedings were made some three years before the transaction. The winding up order was only lodged with the CCM approximately six years after the winding up order was granted. Further, it was undisputed that at the time the transactions of the lands were concluded, there was no record whatsoever to show that the company was wound up. (paras 12, 14, 17 & 18)

(2) The appellants were *bona fide* purchasers for value without notice of any purported act by any other party to defraud the company. As far as the appellants were concerned, they were dealing with the proper directors of the respondent company at the material time and had made full payment to the company. (para 18)

(3) With regard to competing equities, a registered interest always prevails over an equitable interest. The determination of priority should be at the current date. At the time the Court of Appeal made its decision, the appellants were the registered owners. Hence, the appellants' title was indefeasible under s. 340(1) of the National Land Code ('NLC'). The respondent company had relinquished their registered interest in the properties when the sale was concluded. It follows that if the transactions were declared as valid under s. 233 of the Act, then the instrument of transfer was not void or insufficient under s. 340(2) of the NLC nor does the operation of law under s. 340(4)(b) of the NLC defeats the interests of the purchasers. (para 20)

(4) Even if the proviso under s. 340(3) of the NLC that once provided a shield to *bona fide* purchasers for value and without notice (*Adorna Properties Sdn Bhd v. Boonsom Boonyanit*) was to apply, this shield was no longer applicable to the purchasers by virtue of *Tan Ying Hong v. Tan Sian San & Ors*'s decision. However, the proviso under s. 223 of the Act comes as an aid to the purchasers as long as they can prove that they were *bona fide* purchasers with good and honest intention which is the case here. (para 21)

(5) The allegations made by the respondent company against the alleged perpetrators had only presented a one-sided version as there was no evidence that the alleged perpetrators were even served with the cause papers and/or defended the action. In addition, the allegation of fraud could not be determined by affidavit evidence since "fraud" within the meaning of the NLC means "actual fraud" and not "constructive fraud or equitable fraud". The exhibits adduced by the liquidator in an attempt to show that the company had been unlawfully snatched away by some fraudsters were insufficient to prove fraud. (para 22)

(6) The sale and purchase agreement between the appellants and the respondent company was validated under s. 223 of the Act. An order was made that the endorsement of the respondent company as the proprietor of the respective titles be cancelled and the said lands be restored to the appellants free from encumbrances. With that, the question posed to this court was thus answered in the negative. (paras 23 & 24)

Bahasa Malaysia *Translation Of Headnotes*

Syarikat responden telah digulung melalui suatu perintah mahkamah. Setelah menyelesaikan harga belian penuh, perayu-perayu telah membeli tanah masing-masing daripada responden untuk membina rumah kediaman di atas tanah tersebut. Sepanjang transaksi dan pendaftaran pemilikan tanah-tanah tersebut, carian yang diperlukan yang dibuat telah menunjukkan, antara lain, bahawa (i) tanah-tanah tersebut bebas daripada sekatan; (ii) tiada rekod perintah penggulungan didaftarkan terhadap responden; dan (iii) perayu-perayu berurusan dengan pengarah-pengarah syarikat pada masa relevan. Perayu-perayu telah didaftarkan sebagai pemilik berdaftar dan benefisial tanah-tanah tersebut. Di Mahkamah Tinggi, responden telah memfailkan beberapa permohonan, antara lain, terhadap Suruhanjaya Syarikat Malaysia ('SSM') dan pengarah-pengarah dan pemilik-pemilik saham yang palsu dengan memohon supaya rekod responden diperbetulkan akibat penipuan yang telah berlaku dalam transaksi jualan tanah. Adalah juga menjadi tuntutan responden bahawa (i) jualan tanah-tanah dibatalkan; dan (ii) segala transaksi yang dibuat selepas penggulungan responden diakui terbatal. Menolak permohonan responden, Mahkamah Tinggi memutuskan bahawa memandangkan mereka adalah pembeli-pembeli *bona fide* tanah bagi nilai tanpa notis sebarang kecacatan bagi hak milik atau pun penggulungan responden, perayu-perayu telah pun memperolehi hak milik tidak boleh sangkal ke atas tanah-tanah tersebut. Tidak berpuas hati, responden merayu ke Mahkamah Rayuan dan rayuan mereka dibenarkan di mana, telah diputuskan bahawa apabila suatu syarikat digulung, hanya pelikuidasi yang boleh melupuskan harta syarikat dan sebarang instrumen pindah milik yang ditandatangani oleh seseorang adalah terbatal. Oleh itu, rayuan ini oleh pihak perayu. Isu yang dibangkitkan untuk pertimbangan melalui rayuan di sini adalah sama ada syarikat dalam likuidasi yang telah melupuskan tanahnya kepada pihak ketiga tanpa kebenaran pelikuidasi atau perintah mahkamah boleh dianggap sebagai masih mempunyai kepentingan berdaftar ke atas tanah tersebut yang boleh mengalahkan kepentingan berdaftar pihak ketiga yang telah memperoleh harta dengan niat baik bagi nilai dan tanpa notis.

Diputuskan (membenarkan rayuan-rayuan dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Proviso s. 233 Akta masih beroperasi bagi transaksi yang telah berlaku dan mahkamah mempunyai kuasa dan bidang kuasa untuk mengisytiharkan transaksi tersebut sebagai sah. Peraturan am s. 233 Akta adalah bahawa ia tidak mengelak transaksi *bona fide*. Berdasarkan fakta, iklan dan warta berkenaan prosiding penggulungan telah dibuat lebih kurang tiga tahun sebelum transaksi. Perintah penggulungan hanya didaftar dengan SSM kira-kira enam tahun selepas perintah penggulungan dibenarkan. Tambahan lagi, adalah tidak dipertikaikan bahawa ketika transaksi tanah-tanah tersebut disempurnakan, tiada rekod yang menunjukkan bahawa syarikat telah digulungkan.

(2) Perayu-perayu merupakan pembeli *bona fide* dengan nilai tanpa notis bagi sebarang tindakan yang dibuat oleh pihak lain untuk menipu syarikat. Bagi pandangan pihak perayu, mereka telah berurusan dengan pengarah-pengarah sebenar syarikat responden pada masa material dan telah pun membuat bayaran penuh kepada syarikat itu.

(3) Berkenaan persaingan ekuiti, kepentingan berdaftar mengatasi kepentingan ekuiti. Penentuan keutamaan mestilah pada tarikh semasa. Pada masa Mahkamah Rayuan membuat keputusannya, perayu-perayu merupakan pemilik berdaftar. Oleh itu, hak milik perayu-perayu tidak boleh disangkal di bawah s. 340(1) Kanun Tanah Negara ('KTN'). Syarikat responden telah melepaskan hak berdaftar mereka dalam harta itu apabila jualan disempurnakan. Ia diikuti bahawa jika transaksi diisytiharkan sebagai sah di bawah s. 233 Akta, maka, instrumen pindah milik bukanlah tidak sah atau pun tidak mencukupi di bawah s. 340(2) KTN atau pun operasi undang-undang di bawah s. 340(4)(b) KTN mengalahkan hak pembeli-pembeli.

(4) Walaupun proviso di bawah s. 340(3) KTN yang pada suatu ketika dahulu telah memberi perlindungan kepada pembeli *bona fide* dengan nilai tanpa notis (*Adorna Properties Sdn Bhd v. Boonsom Boonyanit*) terpakai, perlindungan ini tidak terpakai kepada pembeli-pembeli melalui keputusan dalam *Tan Ying*

Hong v. Tan Sian San & Ors. Walau bagaimanapun, proviso di bawah s. 233 Akta membantu pembeli-pembeli asalkan mereka boleh membuktikan bahawa mereka adalah pembeli *bona fide* dengan niat yang baik dan ikhlas seperti dalam kes ini.

(5) Tuduhan yang dibuat oleh syarikat responden terhadap pesalah yang dituduh hanya telah mengemukakan versi berat sebelah memandangkan tiada keterangan bahawa pesalah yang dituduh telah disampaikan dengan kertas-kertas kausa dan/atau membela tindakan itu. Tambahan, tuduhan penipuan tidak boleh ditentukan melalui keterangan afidavit memandangkan "frod" dalam erti kata KTN bermakna "frod sebenar" dan bukannya "frod konstruktif atau frod berekuiti". Ekshibit yang dikemukakan oleh pelikuidasi sebagai percubaan untuk menunjukkan bahawa syarikat telah dirampas oleh penyebab penipuan tidak mencukupi untuk membuktikan penipuan.

(6) Perjanjian jual beli antara perayu-perayu dan syarikat responden telah disahkan di bawah s. 223 Akta. Satu perintah telah dibuat bahawa pengendorsan syarikat responden sebagai pemilik hak milik masing-masing dibatalkan dan tanah-tanah itu dikembalikan kepada perayu bebas daripada sekatan. Dengan itu, soalan yang ditujukan kepada mahkamah ini dijawab dalam negatif.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Engtex Marketing Sdn Bhd v. Zinma Housing Development Sdn Bhd & Anor [2009] 5 CLJ 759 HC ***(refd)***

KL Engineering Sdn Bhd & Anor v. Arab Malaysia Finance Bhd [1994] 2 CLJ 480 SC ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

Re Steane's (Bournemouth) Ltd [1950] 1 All ER 21 ***(refd)***

Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors [1994] 4 CLJ 892 HC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 141(6), 223
National Land Code, ss. 8, 89, 340(1), (2), (3), (4)(b)
Rules of the High Court 1980, O. 18 r. 19

For the appellants - Tommy Thomas (Paul Ong, Gabriel Daniel & Sarah Ho Yixin with him); M/s Paul Ong & Assocs
For the respondent - Ranjit Singh (CK Yeoh with him); M/s Ranjit Singh & Yeoh

[Appeal from Court of Appeal; Civil Appeal No: W-02-699-2007]

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] There are four appeals before this court. They are in respect of the four related appeals by the appellants against the order of the Court of Appeal dated 2 July 2010 based on common issues. For the purpose of the argument of the said four appeals before us the parties have agreed to refer to the record of appeal filed under Civil Appeal No. 02(f)-64-10/2011(W) and the decision in Appeal No. 02(f)-64-10/2011(W) binds the parties in respect of the remaining three other appeals namely: Civil Appeal No. 02(f)-65-10-2011(W), Civil Appeal No. 02(f)-66-10-2011(W) and Civil Appeal No. 02(f)-67-10-2011(W).

[2] Leave to appeal was granted by this court in respect of all four appeals on the following question:

> Whether a Company in liquidation which has disposed of its land to a third party without the consent of the liquidator or order of court can be construed to still have a registered interest in that land which could defeat the registered interest of the third party who acquired the property in good faith for value and without notice.

Background Facts

[3] The background facts relating to these four appeals before us may be summarised as follows:

(1) The respondent company was wound-up by an order of court dated 24 August 2000.

(2) Subsequent to the winding up of the respondent, the respondent claimed that the register of members, directors and company secretary were amended to have a new set of shareholders, directors and company secretary in place of the then existing shareholders, directors and company secretary. The respondent's registered office and place of business were likewise changed.

(3) All the above claims were alleged to have been made without the consent of the liquidator or leave of court and the then directors of the respondent were likewise unaware of the same.

(4) From 9 October 2003 till 29 January 2004 the appellants, Wong Wee Kheong and Ho Mei Ling (joint purchasers) and Kenneth Too Heng Khuen had separately transacted and bought their respective piece of land from the respondent to build their residential home thereon. The full purchase price for the said lands was paid to the respondent by the appellants, payments of which have been received and acknowledged.

(5) Throughout the said transaction and registration of ownership of the said lands from the respondent to the appellants, necessary searches were conducted. The searches revealed that:

(i) the said land was free from encumbrances, liens, charges, caveats and restriction in title;

(ii) there was no record of a winding-up order being lodged against the respondent; and

(iii) the appellants were dealing with the proper company directors at the relevant times.

(6) As at 3 March 2004 the appellants were duly registered as the legal and beneficial owners of the said land.

Proceedings At The High Court

[4] At the High Court, the respondent had filed different suits in different courts in order to recover the respective piece of land which had been registered in the name of the appellants. The said suits are as follows:

(1) Suit No. D5-24-81-2006 ("the first suit")

In this suit, the respondent filed an application against the Companies Commission of Malaysia and the purported "bogus" directors and shareholders of the company seeking for an order that the respondent's company records be rectified alleging that fraud and forgery of instruments on the part of the alleged "bogus" directors and shareholders and a declaration that all transactions made after the winding up of the respondent be declared void. The High Court dismissed the respondent's application *inter alia* on the following grounds:

(i) the action taken by the respondent is an abuse of the process of the court as the appellants were not made a party in the present suit, the appellants would be oppressed and their rights and interest over the said land will be jeopardised by any decision made in favour of the respondent without the appellants being accorded any opportunity to be heard;

(ii) being *bona fide* purchasers of the said land for value and without notice of any defect to title or the winding-up of the respondent, the appellants have acquired indefeasibility of title over the said land;

(iii) section 223 of the Companies Act 1965 does not apply to land matters as in the present action; and

(iv) there was a delay in filing the present application.

(2) Suit No. S7-22-664-2006 ("the second suit")

In this suit, the respondent filed another application not only against the purported "bogus" directors and shareholders but also against the appellants (Wong Wee Kheong and Ho Mei

Ling) seeking to nullify the sale of the said land and to recover the said land from the appellants. Again, the High Court dismissed the respondent's application *inter alia* on the grounds of:

(i) multiplicity of proceedings as the respondent had filed another suit (Suit No. D5-24-81-2006) for the same relief; and

(ii) the issues raised in the present action have been decided in Suit No. D5-24-81-2006 and have now been *res judicata.*

In view of the High Court's decision in the second suit, the appellants then filed an application to strike out the respondent's second suit under O. 18 r. 19 of the Rules of the High Court 1980. The appellants' application was however dismissed by the High Court.

(3) Suit No. S1-22-665-2006 ("the third suit")

This suit was also filed by the respondent against the purported "bogus" directors and shareholders as well as against the appellant (Kenneth Too Heng Khuen) seeking similar relief prayed for in the second Suit. This suit was heard before a different High Court Judge who allowed the respondent's application after holding, *inter alia*, that by operation of s. 223 of the Companies Act 1965, the transfer of the lands in issue to the appellants was void.

Proceedings At The Court Of Appeal

[5] Dissatisfied with the decisions of the High Court, the following appeals were filed by the parties to the Court of Appeal:

(i) the respondent's appeal against the decision of the High Court in dismissing the first suit (Court of Appeal Civil Appeal No. W-02-699-2007);

(ii) the respondent's appeal against the decision of the High Court in dismissing the second suit (Court of Appeal Civil Appeal No. W-02-1166-2007);

(iii) the appellants' (Wong Wee Kheong and Ho Mei Ling) appeal against the decision of the High Court in dismissing the striking out application in the second suit (Court of Appeal Civil Appeal No. W-02(IM)-252-2009); and

(iv) the appellant's (Kenneth Too Heng Khuen) appeal against the decision of the High Court in allowing the third Suit (Court of Appeal Civil Appeal No. W-02-1059-2007).

All of the appeals by the appellants and the respondent were heard together and on 2 July 2010, the Court of Appeal made the following orders:

(i) the respondent's appeal against the decision of the High Court in the first suit was allowed and an order-in-terms of prayers (i) to (vi) in the said suit was granted;

(ii) the respondent's appeal against the decision of the High Court in the second suit was allowed and an order-in-terms of prayers (i) to (iii) in the said suit was granted;

(iii) the appellants' (Wong Wee Kheong and Ho Mei Ling) appeal against the decision of the High Court in dismissing the striking out application in the second suit was dismissed; and

(iv) the appellant's (Kenneth Too Heng Khuen) appeal against the decision of the High Court in the third suit was dismissed and the order of the High Court affirmed.

[6] In its broad reasons, the Court of Appeal held *inter alia* as follows:

1. This is our unanimous decision.

2. We find upon being wound up a company can only dispose of its property through its Liquidator. In this case the instrument of transfer was not signed by the Liquidator but by persons who claimed to be directors of the wound-up company.

3. It follows that the instrument that was signed was a void instrument and under section 340(2)(b) of the National Land Code the transfer is void.

4. Even if assuming the Court has a discretion under section 223 of the Companies Act 1965 as in the case of *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors* [1994] 4 CLJ 892 to validate a transfer, we see no reason to do so in preference to the Purchasers given that the company has an indefeasibility as well in respect of its property which is earlier in time and even after the winding-up the purchasers should not be treated in preference to the general body of creditors.

5. To do so would be deny the rights of the general body of creditors.

Decision

[7] It is noted that the Court of Appeal had decided that once a company is wound up, only the liquidator can dispose of property of the company. Any instrument of transfer signed by any other person was void. Section 223 of the Companies Act 1965 ("the Act") provides as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void. (emphasis added)

[8] Learned counsel for the respondent in support of the decision of the Court of Appeal amongst others submitted that under s. 223 of the Act the transfers of the portions of the land in question after the presentation of the winding up petition of the respondent company were void. After the company has been wound up the board of directors of the company becomes *functus officio*. The liquidator displaced the directors and the control of the activities of the company was vested with the liquidator. No one except the liquidator can act for the company.

[9] It was the contention of the respondent in the present case that the instruments of transfer were executed by persons who claimed to be the directors of the respondent company. The instruments of transfer were not executed by the liquidator, that is the official receiver. Therefore, clearly such instruments were void.

[10] On the issue of indefeasibility of title, learned counsel for the respondent contended that the appellants cannot seek the protection of the proviso contained in s. 340(3) of the National Land Code ("NLC"). Section 340(3) of the NLC provides as follows:

> Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) –
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[11] In respect of the operation of s. 340(2) and 340(3) of the NLC it was submitted for the respondent that the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 had overturned *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241 and laid down the law of indefeasibility of title to its proper perspective. The Federal Court therein held that under s. 340 of the NLC deferred indefeasibility applies. As such an immediate transferee of any title or interest in land such as the appellants cannot take advantage of the proviso to s. 340(3) of the NLC to avoid its title or interest from being impeached.

[12] With respect we could not agree with the above contention of the respondent. It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. However based on the peculiar set of facts of the case, it is our considered view that the proviso in s. 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid.

[13] It is to be noted that s. 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time. We are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s. 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:

(a) if the transaction(s) are beneficial to the general body of creditors; or

(b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.

[14] The general rule in s. 223 of the Act is that it does not shut out *bona fide* transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 which states:

> that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.

The discretion is an unfettered one.

[15] In *Engtex Marketing Sdn Bhd v. Zinma Housing Development Sdn Bhd & Anor* [2009] 5 CLJ 759, the issue of whether disposition of the company's property after winding up without sanction of court arose. The court held that although s. 223 of the Act would invalidate such transfers, with regard to the *bona fide* purchaser, the provision would not apply when there is no allegation of misrepresentation or fraud or collusion against the purchaser or that the purchaser acted in concert with the persons in the company to effect the disposition despite being aware that that person had no authority to do so.

[16] In the case of *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors* [1994] 4 CLJ 892, the plaintiff had entered into an agreement with the defendant to buy a piece of land. The purchase price was to be paid in instalments. The plaintiff paid some and defaulted the rest. The defendant repudiated the contract and sold the land to B. The defendant was wound up but nonetheless transferred the land to B. The plaintiff sued the defendant for specific performance. The issues that arose were whether the disposition to B was void and whether B was a *bona fide* purchaser. Siti Norma, J (as she then was) held that there was no allegation of misrepresentation or fraud against B nor did they act in concert with the defendant to effect the disposition while being aware that the defendant had no authority to do so. The plaintiff's cause of action would be against the defendant and not B. B obtained indefeasible title. Section 223 of the Act empowers the court to validate a transaction that otherwise would be void. It is to be noted that in this case there was no application to validate but the court declared it as such.

[17] Coming back to the present case on the facts it is noted that the advertisements and gazette in respect of the winding-up proceedings were made some three years before the transaction. The records at the Insolvency Department and/or the Registrar of Companies would be a conclusive indicator of the company's status as provided in s. 141(6) of the Act and s. 8 of the NLC (See the cases of *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 and *KL Engineering Sdn Bhd & Anor v. Arab Malaysia Finance Bhd* [1994] 2 CLJ 480; [1994] 2 MLJ 201. It is undisputed that at the time the first and second transaction of the lands in question took place and were concluded, there was no record whatever that the company was wound up. An officer from the Insolvency Department, Asrul Nizam bin Abdullah affirmed an affidavit on 4 February 2005 confirming that, even as at that date, no winding up order had been lodged.

[18] As regards the winding up order it was only lodged with the Companies Commission of Malaysia (CCM) on or about 16 January 2006 approximately six years after the winding up order was granted when Mr Lim Tian Huat, the liquidator of the company, took over from the Director of Insolvency, and two years after the first and second transaction of the lands were completed. There is absolutely no allegation of fraud or collusion

or even dishonesty against the purchasers. For all intent and purposes the first appellant, the second appellant and Kenneth Too Heng Khuen were *bona fide* purchasers for value without notice of any purported act by any other party to defraud the company. As far as the purchasers were concerned, they were dealing with the proper directors of the respondent company at the material time and have made full payment to the company.

[19] In *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 the Court of Appeal decided that to be a *bona fide* purchaser one should have contracted in good faith for value, and that knowledge of an adverse claim is not fraud. The material time is the time of the transaction. We are of the view the purchasers here were entitled to rely on the conclusiveness of the register at the Companies Commission of Malaysia (CCM) in respect of the respondent company's officers pursuant to s. 141(6) of the Act and the status of the company and to rely on the register at the Land Office in respect of the properties pursuant to s. 89 of the NLC.

[20] The Court of Appeal in the present case found that priority should be given to the respondent company which had a registered interest first in time as opposed to the appellants as purchasers, despite the purchasers having obtained title subsequently. With respect we do not agree based on the factual circumstances of the case. On this point, with regard to competing equities, a registered interest always prevails over an equitable interest. The determination of priority should be at the current date. The purchasers were the registered owners at the time the Court of Appeal made its decision. The titles were still registered in their name. Their title in our view is indefeasible under s. 340(1) of the NLC. The respondent company had relinquished their registered interest in the properties when the sale was concluded. It follows, that if the transactions are declared as valid under s. 223 of the Act, then the instrument of transfer was not void or insufficient under s. 340(2) of the NLC nor does the operation of law under s. 340(4)(b) of the NLC defeat the interests of the purchasers.

[21] The Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors (supra)* cited in support of the respondent's case in our view is of no utility to the factual matrix of this case. This is because in that case the registration of the appellant on the title

was obtained by fraud or forgery and the appellant never charged the land to the bank. Furthermore, in that case, the appellant never granted any Power of Attorney (PA) to the first respondent and the appellant had never authorised the first respondent to charge the land. In the present case, as far as the appellants as purchasers were concerned they were dealing with directors of the respondent company who were authorised to sign the relevant documents. It is also undisputed that there were no records of a winding up order against the company at the Registrar of Companies and the Insolvency Department. Even if the proviso of s. 340(3) of the NLC that once provided a shield to *bona fide* purchasers for value and without notice (*Boonsom Boonyanit*'s case) is to apply, this shield is no longer applicable to the purchasers by virtue of the *Tan Ying Hong*'s decision. It must be noted that the proviso under s. 223 of the Act comes as an aid to the purchasers as long as they can prove they were *bona fide* purchasers with good and honest intention which is the case here. (See the case of *Seek Lai Neo & Anor v. Cheng Chuan Development Sdn Bhd & 2 Ors (supra)*).

[22] For the respondent company it was argued that as far as they were concerned, the transfer of the property was done by "bogus" directors who had taken over the company without the consent of the liquidator or the court, and as a result the transfers were secured by means of an insufficient or void instrument under s. 340(2)(b) of the NLC. On this point learned counsel for the appellants was right in submitting that the allegations made by the company against the alleged perpetrators only presented a one-sided version as there was no evidence that the alleged perpetrators were even served with the cause papers and/or defended the action. Although apparently police reports had been lodged by the persons claiming to be the rightful directors, there is no evidence whatsoever of anyone being arrested, charged and/or convicted because of the fraud alleged by the liquidator. There is a serious doubt as to the authenticity of the police reports allegedly made as some do not bear any official report numbers or certification/stamp by the police department and/or not in the usual format of police reports lodged. Allegation of fraud cannot be determined by affidavit evidence. "Fraud" within the meaning of NLC means "actual fraud" and not "constructive fraud or

equitable fraud". (See the case of *Ong Ban Chai & Ors v. Seah Siang Mong (supra)*). The exhibits adduced by the liquidator in an attempt to show that the company has been "unlawfully snatched" away by some fraudsters are insufficient to prove fraud. These documents merely indicate who were the past and current officers of the company.

Conclusion

[23] For the reasons above stated we would answer the question posed in this appeal in the negative. All of the four appeals are allowed with costs here and at the Court of Appeal and at the High Court (in respect of Appeal No. 02(f)-67-10/2011) in favour of the appellants. The costs are to be paid by the liquidator of Daya Bersama Sdn Bhd. We would also make the necessary order that the sale and purchase agreement dated 30 October 2003 between Wong Wee Kheong and Ho Mei Ling and Daya Bersama Sdn Bhd be validated under s. 223 of the Companies Act 1965 and that the Sale and Purchase Agreement dated 30 October 2003 between Kenneth Too Heng Khuen and Daya Bersama Sdn Bhd be validated under s. 223 of the Act.

[24] We would also make an order that the endorsement of Daya Bersama Sdn Bhd as proprietor of the respective titles stated below (subsequent to the decision of the Court of Appeal) be cancelled and the said lands be restored to the appellants free from encumbrances, namely:

(i) GM 2926 Lot 35387 Sungai Serdang, Mukim Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan in favour of Wong Wee Kheong and Ho Mei Ling;

(ii) GM 2927, Lot 35389, Mukim Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan in favour of Kenneth Too Heng Khuen.

[25] A further order is made that the Registrar's caveats on the lands above be cancelled forthwith and that the Registrar of Titles at the Land Office Wilayah Persekutuan do make the necessary memorials to reflect on all the orders made.

[26] We award costs of RM100,000 to the appellants here and the courts below. Deposit to be refunded to the appellants.